

We are adopting in the final rule the commenter's recommendation to require AAJs to consider all requests for Appeals Council review in cases in which judicial review would be precluded by the monetary amount at issue. This change from the proposed rule is consistent with our overall intent, which is to empower Appeals Officers to deny requests for review of hearing decisions when such action results in a final decision on which the claimant has a right to seek judicial review under section 205(g) of the Act. To adopt this recommendation, we are making a change in the final rule to specify an additional category of cases in which the authority to deny a request for review will remain exclusively with the AAJ.

The change we are making in the final rule, see below, reserves to the AAJs exclusive authority to deny a request for review of an ALJ hearing decision in any case in which the Secretary's final decision after an ALJ hearing is not subject to judicial review. Such cases are identified in § 422.210(a) and include cases under title XI as well as cases under title XVIII.

There is no right to judicial review under section 205(g) of the Act where the Appeals Council denies a party's request that the Council review and vacate an ALJ's dismissal of a request for a hearing (because there is no final decision of the Secretary after an ALJ hearing in these instances). Where a request for a hearing is dismissed based on application of a monetary minimum and the Council denies a request for review, the monetary minimum effectively precludes judicial review. The final rule, like the proposed rule, addresses the commenter's concerns regarding the exercise of the Council's authority to deny a request for review in such cases since it provides that only AAJs will have authority to deny a request for review of an ALJ dismissal of a request for a hearing.

Change in the Final Rule

After considering the comments on the NPRM, we are publishing a final rule that differs in one respect from the proposed rule. The second sentence of § 422.205(c) as proposed stated: "The denial of a request for review of a hearing dismissal, the dismissal of a request for review, or the refusal of a request to reopen a hearing or Appeals Council decision concerning a determination under § 422.203(a)(1) shall be by such member or members of the Appeals Council as may be designated in the manner prescribed by the Chair or Deputy Chair." For the reasons discussed above, we are revising

that sentence in the final regulation to state: "The denial of a request for review of a hearing dismissal, the dismissal of a request for review, the denial of a request for review of a hearing decision whenever such hearing decision after such denial would not be subject to judicial review as explained in § 422.210(a), or the refusal of a request to reopen a hearing or Appeals Council decision concerning a determination under § 422.203(a)(1) shall be by such member or members of the Appeals Council as may be designated in the manner prescribed by the Chair or Deputy Chair."

Regulatory Procedures

Executive Order No. 12866

We have consulted with the Office of Management and Budget (OMB) and determined that this rule does not meet the criteria for a significant regulatory action under Executive Order 12866. Thus, the rule is not subject to OMB review.

Regulatory Flexibility Act

We generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 through 612) unless the Secretary certifies that a rule will not have a significant economic impact on a substantial number of small entities. Individuals are not included in the definition of a small entity. However, for the purposes of the RFA, we consider the majority of Medicare providers, physicians and suppliers to be small entities.

Inasmuch as the final rule does not alter the standards for Appeals Council review, we believe that it will have little, if any, effect on providers, physicians and suppliers which request Appeals Council review of Medicare claims. Accordingly, we have determined, and the Secretary certifies, that this final rule will not result in a significant economic impact on a substantial number of small entities. Therefore, we have not prepared an RFA analysis.

Paperwork Reduction Act

This regulation imposes no new reporting or recordkeeping requirements requiring OMB clearance.

(Catalog of Federal Domestic Assistance Program Nos. 93.773 Medicare-Hospital Insurance; 93.774 Medicare-Supplementary Medical Insurance; 93.802 Social Security-Disability Insurance; 93.803 Social Security-Retirement Insurance; 93.804 Social Security-Special Benefits for Persons Age 72 and Over; 93.805 Social Security-Survivors Insurance; 93.806 Social Benefits for Disabled Coal

Miners; and 93.807 Supplemental Security Income.)

List of Subjects in 20 CFR Part 422

Administrative Practice and Procedure, Freedom of Information, Organization and Functions (government agencies), Social Security, Reporting and recordkeeping requirements.

Dated: November 10, 1994.

Shirley Chater,

Commissioner of Social Security.

Approved: January 31, 1995.

Donna E. Shalala,

Secretary of Health and Human Services.

For the reasons set out in the preamble, we are amending Part 422 of Chapter III of Title 20 of the Code of Federal Regulations as follows:

PART 422—ORGANIZATION AND PROCEDURES

1. The authority citation for Subpart C continues to read as follows:

Authority: Secs. 205, 221, 1102, 1869, and 1871 of the Social Security Act; 42 U.S.C. 405, 421, 1302, 1395ff, and 1395hh; sec. 413(b) of the Federal Mine Safety and Health Act of 1977; 30 U.S.C. 923(b).

2. Section 422.205 is amended by revising paragraph (c) to read as follows:

§ 422.205 Review by Appeals Council.

* * * * *

(c) The denial of a request for review of a hearing decision concerning a determination under § 422.203(a)(1) shall be by such appeals officer or appeals officers or by such member or members of the Appeals Council as may be designated in the manner prescribed by the Chair or Deputy Chair. The denial of a request for review of a hearing dismissal, the dismissal of a request for review, the denial of a request for review of a hearing decision whenever such hearing decision after such denial would not be subject to judicial review as explained in § 422.210(a), or the refusal of a request to reopen a hearing or Appeals Council decision concerning a determination under § 422.203(a)(1) shall be by such member or members of the Appeals Council as may be designated in the manner prescribed by the Chair or Deputy Chair.

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